IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1221

STATE OF WISCONSIN, Appellant,

v.

NORMA GRACE CONSTANTINEAU, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Jan. 27, 1969 - Complaint filed in the United States District Court for the Eastern District of Wisconsin by Norma Grace Constantineau, Plaintiff, against James W. Grager, Chief of Police, Hartford, Wisconsin, Defendant, asserting two causes of action and requesting a three-judge panel.

Feb. 3, 1969 - Summons returned, having been served on Jan. 31, 1969.

Feb. 13, 1969 - Notice of retainer and appearance by Wickham, Borgelt, Skogstad and Powell, attorneys for defendant.

Feb. 17, 1969 - Stipulation and order extending time to answer.

Feb. 26, 1969 - Order by Chief Judge of the Seventh Circuit designating the members of a three-judge U.S. District Court to hear and determine this case.

Mar. 25, 1969 - Motion of State of Wisconsin to intervene as a defendant in the second cause of action, with proposed answer of applicant for intervention; pre-trial conference held.

Mar. 26, 1969 - Order of United States District Judge John W. Reynolds following pre-trial conference. This order:
(1) granted the motion of the State of Wisconsin to intervene as a party defendant in the second cause of action;
(2) separated the first and second causes of action;
(3) stated that the issue to be decided on the oral motion for judgment on the pleadings of defendants was solely whether secs. 176.26 and 176.28 (1), Wis. Stats., were constitutional on their face.

Apr. 4, 1969 - Answer of defendant James W. Grager to second cause of action.

June 6, 1969 - Hearing held on defendant's motion for judgment on the pleadings.

Aug. 19, 1969 - Opinion holding secs. 176.26 and 176.28 (1), Wis. Stats., unconstitutional on their face. U. S. Senior Circuit Judge F. Ryan Duffy files dissenting opinion.

Nov. 25, 1969 - Order enjoining defendants from enforcing the provisions of secs. 176.26 and 176.28, Wis. Stats.

Dec. 24, 1969 - Notice of appeal filed by State of Wisconsin to the Supreme Court of the United States from Order of Nov. 25, 1969.

Jan. 8, 1970 - Affidavit of Benjamin Southwick concerning hearing of Jun. 6, 1969.

Feb. 18, 1970 - Transcript (pp. 1 - 33) of Jun. 6, 1969 hearing filed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police,
Hartford, Wisconsin, Defendant

COMPLAINT

Filed Jan. 27, 1969

FIRST CAUSE OF ACTION

1. Jurisdiction herein is founded on 42 U.S.C. 1983 and 28 U.S.C. 1343(3).

2. That plaintiff is an adult residing at 580 Lake, Hartford Wisconsin and is a citizen of the United States of American and of the State of Wisconsin.

3. That defendant is the Chief of Police of Hartford Wisconsin and who, at all times mentioned herein, acted pursuant to sec. 176.26 and 176.28(1) of the Wisconsin Statutes, and under color of law, custom and usage of the State of Wisconsin.

4. That heretofore, to wit, on Jan. 23, 1969 defendant, in his capacity of Chief of Police of the City of Hartford, Wisconsin, and acting under color of law, custom and usage of the State of Wisconsin and City of Hartford, and in bad faith and arbitrarily, issued a decree signed by him, a copy of which is attached hereto, wherein he ordered and ruled that plaintiff herein, an adult, could no longer have the right and privelege to purchase alchololic beverages in the City of Hartford; that thereafter, defendant wilfully, maliciously and wantonly caused said decree to be published, circulated and served on various persons throughout the City of Hartford in the form of a "Notice", identifying plaintiff herein as the person to whom the sale or transfer to of alchoholic beverages was forbidden for a period of one year following Jan. 23, 1969.

5. That the said acts of defendant pursuant to said statutes and under the color, custom and usage of the State of Wisconsin and the City of Hartford, as used and enforced against the plaintiff by the defendant have deprived plaintiff of her liberty to purchase and receive alchoholic beverages, which now is and has always been an acknowledged and accepted right of every citizen of the State of Wisconsin and of the United States of America.

6. That the said statutes as so enforced by defendant against plaintiff are unconstitutional for the following reasons:

a. They deprive plaintiff of her liberty without due process of law in violation of the 14th amendment of the Constitution of the United States.

b. They violate the procedural due process guarantees of the 14th amendment of the United States Constitution by permitting defendant to arbitrarily grant, limit or refuse to plaintiff the right of plaintiff to purchase and receive alchoholic beverages without according plaintiff the right to a hearing or notice prior to said action on behalf of defendant.

c. They violate the due process requirements and guarantees of the 14th amendment of the Constitution of the United States by transferring judicial powers to ministerial and legislative officials.

d. They are vague and overly broad and incapable of proper application by their not containing definite standards or guidelines.

e. They deprive plaintiff of the equal protection of the laws and discriminate against her in violation of the equal protection clause of the Constitution of the United States.

d. They deprive plaintiff of her right to privacy guaranteed to her by the 9th amendment and the due process clause of he 14th amendment of the Constitution of the United States.

e. They deprive plaintiff of her priveleges and immunities guaranteed to her as a United States Citizen by the Constitution of the United States.

7. That the decree and order of defendant, made under color, custom and usage of the laws of Wisconsin and Hartford, as so published, circulated and served throughout the City of Hartford is contrary to and violative of the federally protected constitutional rights of plaintiff as guaranteed her

by the first, fifth, ninth and fourteenth amendments to the Constitution of the United States, and has caused her great, clear and immediate injury to her mind, person and reputation; that plaintiff verily believes that such injury to her mind, person and reputation will continue indefinitely in the future and that she has suffered and endured humiliation, embarassment and injury and verily believes that such will continue indefinitely in the future, all to her damage in the sum of one hundred thousand ($100,000) dollars compensatory damages and an additional one hundred thousand ($100,000) dollars punitative damages.

SECOND CAUSE OF ACTION

8. Plaintiff realleges allegations (2) through (6) of the first cause of action.

9. Jurisdiction is herein founded under sec. 28 U.S.C. 2281.

10. That the decree and order *of defendant* as chief of police of Hartford, Wisconsin, made under color of law, custom and usage of the State of Wisconsin and City of Hartford is contrary to and violative of the federally protected constitutional rights, privileges and immunities of plaintiff and has caused plaintiff great, clear and immediate and irreparable injury and will continue to cause plaintiff great, clear and immediate and irreparable injury if the defendant is not restrained from continuing in his wrongful conduct.

11. That the injury plaintiff has suffered and continues to suffer and which she will suffer in the future cannot be adequately redressed in an action at law, there being no remedy at law for the wrongs of defendant.

WHEREFORE for the first cause of action, plaintiff demands judgment against defendant for $100,000 compensatory

damages and an additional $100,000 punitative damages plus costs.

WHEREFORE for the second cause of action plaintiff demands judgment as follows:

1. For a ruling by a 3 Judge Court declaring secs. 176.26 and sec. 176.28(1) unconstitutional.
2. For a permanent injunction restraining defendant from serving publishing and circulation notices ordering all persons served not to sell or transfer to plaintiff any alchoholic beverages.
3. For the convening of a 3 Judge Court to consider said matters.

(161 W.Wis.Ave. Milw.)

/s/ S. A. SCHAPIRO
S. A. SCHAPIRO, Attorney for
Plaintiff

NOTICE

NOTICE IS HEREBY GIVEN, To all parties concerned, that you, and each of you are hereby forbidden to sell or give away to GRACE NORMA CONSTANTINEAU, any intoxicating liquors of whatsoever kind for a period of one year from date, under pain of the penalties provided by Sections 176.26 and 176.28(1) of the Wisconsin Statutes.

176.28–Sale to forbidden person; evidence; pleading. (1) When the sale or giving away of any intoxicating liquors or fermented malt beverages to any person shall have been forbidden in the manner provided by law, every person who shall sell or give to, or for or purchase or procure for, or in behalf of, such prohibited person any such intoxicating liquors or fermented malt beverages, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding $250

and the costs of prosecution, and in default of immediate payment thereof he shall be committed to the county jail or house of correction not less than 60 days unless sooner discharged by the payment of such fine and costs.

Dated at *Hartford*, Wisconsin, this *23rd* day of *January*, 1969.

/s/ James W. Grager
Chief of Police

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police,
Hartford, Wisconsin, Defendant

STATE OF WISCONSIN,
Applicant for Intervention

MOTION TO INTERVENE AS A DEFENDANT

Filed Mar. 25, 1969

The State of Wisconsin, by Robert W. Warren, Attorney General and Benjamin Southwick, Assistant Attorney General, its attorneys, moves this court for an order permitting it to intervene herein and become a party herein on the ground that the representation of the applicant's interest in upholding the constitutionality of its statutes, sections 176.26 and 176.28 (1), Wisconsin Statutes, by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. A copy of the proposed answer of the State of Wisconsin is attached hereto.

Dated March 25, 1969.

ROBERT W. WARREN
Attorney General

BENJAMIN SOUTHWICK
Assistant Attorney General

Attorneys for Applicant
For Intervention

Department of Justice
State Capitol
Madison, Wisconsin

PROPOSED ANSWER OF APPLICANT FOR INTERVENTION

Now comes the applicant for intervention State of Wisconsin, by Robert W. Warren, Attorney General, and Benjamin Southwick, Assistant Attorney General, by way of answer to plaintiff's complaint, and alleges and shows to the Court as follows:

1. Applicant for intervention states that it has no knowledge or information sufficient to form a belief as to the truth of the averment in plaintiff's complaint that defendant James W. Grager acted pursuant to or enforced sections 176.26 and 176.28 (1), Wisconsin Statutes.

2. Applicant for intervention denies that the liberty to purchase and receive alcoholic beverages is now and always has been an acknowledged and accepted right of every citizen of the State of Wisconsin and of the United States of America.

3. Applicant for intervention denies that sections 176.26 and 176.28 (1), Wisconsin Statutes, are unconstitutional.

4. Applicant for intervention denies that the injuries plaintiff has suffered and will continue to suffer in the future, if any, cannot be adequately redressed in an action at law or that there is no remedy at law for the wrongs, if any, of the defendant.

5. Applicant for intervention denies that 28 U.S.C. 2281 is applicable to the facts as alleged by the plaintiff.

6. Except as noted above, applicant for intervention states that it has no knowledge or information sufficient to form a belief as to the truth of plaintiff's complaint.

7. For a first, separate and distinct defense, applicant for intervention alleges that the court lacks jurisdiction under 28 U.S.C. 2281 over the subject matter of the complaint on the ground that it fails to raise a substantial constitutional question requiring the convening of a three-judge district court; because in substance plaintiff attacks only the application of sections 176.26 and 176.28 (1) to the facts in question; because plaintiff's claim could properly and adequately be determined in State court.

8. For a second, separate and distinct defense applicant for intervention alleges that plaintiff's complaint fails to state a claim upon which relief can be granted under 28 U.S.C. 2281 on the ground that it fails to raise a substantial constitutional question requiring the convening of a three-judge district court; because in substance plaintiff attacks only the application of sections 176.26 and 176.28 (1) to the facts in question; because plaintiff's claim could properly and adequately be determined in State court.

9. For a third, separate and distinct defense applicant for intervention alleges that the second cause of action must be separated from the first cause of action on the ground that jurisdiction of the first cause of action is not grounded in 28

U.S.C. 2281; that the court lacks jurisdiction under 28 U.S.C. 2281 of the subject matter of the first cause of action of plaintiff's complaint.

WHEREFORE applicant for intervention demands judgment dismissing plaintiff's complaint insofar as it seeks to have sections 176.26 and 176.28 (1) Wisconsin Statutes found unconstitutional; separating plaintiff's first cause of action from plaintiff's second cause of action.

Dated March 25, 1969.

ROBERT W. WARREN
Attorney General

/s/ Benjamin Southwick
BENJAMIN SOUTHWICK
Assistant Attorney General

Attorneys for Applicant
For Intervention

Department of Justice
State Capitol
Madison, Wisconsin

TRANSCRIPT OF PROCEEDINGS

Filed Feb. 18, 1970

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police,
Hartford, Wisconsin, Defendant

Transcript of proceedings had in the above-entitled matter before a Three-Judge Court, The Honorable F. Ryan Duffy, The Honorable John W. Reynolds, and The Honorable Myron Gordon, on the 6th day of June, 1969, commencing at 2:00 o'clock p.m.

Appearances:

S. A. Schapiro, Esq., appeared on behalf of the Plaintiff;

Benjamin Southwick, Esq., Assistant Attorney General, appeared on behalf of Defendants Grager and State of Wisconsin;

Richard T. Becker, Esq., appeared on behalf of Defendant Grager on second cause of action;

Edmund W. Powell, Esq., appeared on behalf of Defendant Grager on first cause of action.

Proceedings.

* * *

Motion to Present Witnesses by Attorney Southwick:

[20] JUDGE DUFFY: Very well.

Who desires to speak first?

You have about five minutes of your time for rebuttal.

MR. SOUTHWICK: With the leave of the Court, I would like to call a witness, if that is possible. I am not entirely familiar with the procedure here. Can I present facts by calling a witness.

JUDGE DUFFY: Very seldom. I have been in many three-judge courts, I don't think I have ever sat on one where it's been done, but I assume there are situations that arise where it could be done.

JUDGE REYNOLDS: It is my understanding in the order following the pre-trial, the issue was whether or not this Statute was on the face of the Constitution or not. And for the purposes of this hearing, the State accepted all the allegations as true.

MR. SOUTHWICK: I think there are some facts to be presented which would be relevant to the Constitutional question.

JUDGE DUFFY: Your motion to present a witness at this time in view of the stipulation at the pre-trial hearing and so forth will be denied. You may proceed.

* * * * * * * * *

Discussion Between United States District Judge Reynolds and Attorney Southwick:

JUDGE REYNOLDS: Doesn't this also hold a man up to ridicule in a community? I think to be posted in every saloon in your home town, if your wife wanted – if she got mad at you, she could post you over the City of Madison. You live in Madison?

MR. SOUTHWICK: Yes.

JUDGE REYNOLDS: In every city saloon in Madison, she could have your name on the wall. That wouldn't help your law business, if you are in private practice. It seems like an awful lot of power to give the wife. I am all for wives, but –

MR. SOUTHWICK: The Attorney General pointed out in his brief, I think, the party posted would have some recourse.

JUDGE REYNOLDS: What recourse?

MR. SOUTHWICK: Attempting to get a writ of certiorari would be one, or have a damage action at law.

JUDGE REYNOLDS: I don't think I am as much concerned about whether or not you can get a drink, go from Hartford to Hartland or some other community, but the fact of being held up to ridicule for reasons which the party may not have any – may not know why. I think this is the right which has not been mentioned which bothers me more than –
[25] because even during prohibition, everyone could get a drink, so that's not the problem.

MR. SOUTHWICK: Well, if we look at the cases cited in the Attorney General's brief, for instance, –

JUDGE REYNOLDS: I want your personal opinion. Does that seem fair to you?

MR. SOUTHWICK: It seems fair to me. I think the requirements of due process have been met, Your Honor.

JUDGE REYNOLDS: Okay.

MR. SOUTHWICK: As I was speaking, I think historically the so-called right of a person to purchase and consume alcoholic beverages has been a frail right and a right which has been extremely vulnerable to the State's powers to regulate it. And secondly, I think we should look not only to the nature of the right of Plaintiff in this action, but also to the alternatives available to the Plaintiff here.

Now, the Plaintiff has been posted within the City of Hartford, but there's been – I think it's an admitted fact that the Plaintiff has been drinking outside the City of Hartford since January 23rd, 1969, on the date when she was posted. And I have been led to believe that the Plaintiff is not even a resident of the City of Hartford, so I don't see that this is an action taken by the Defendant here is going to have impaired

6] greatly her right to consume alcoholic beverages. She has the whole universe to purchase alcoholic beverages outside the City of Hartford, and even the area where she lives. So I think if we apply the test which I think is the proper test to determine whether the requirements of due process have been met here and if we look at cases which the Attorney General cited in his brief where rights have been taken away without a hearing and where the withdrawals have been challenged on a due process challenge and look at the nature of the rights and many of them are economic rights, and we look at the application of the tests sent forth in Joint Anti-Fascist League and Cafeteria Workers versus McElroy, and we look at these cases, I think the Court is -- the inevitable conclusion arises that the requirements of due process have been met in this case.

* * * * * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police, Hartford, Wisconsin, and STATE OF WISCONSIN, Defendants

OPINION AND ORDER

Filed Aug. 19, 1969

Before DUFFY, Circuit Judge, and REYNOLDS and GORDON, District Judges.

REYNOLDS, District Judge. The complaint herein, brought pursuant to § 1983 of Title 42 and § 2281 of Title 28

of the United States Code of Laws, challenges the constitutionality of § § 176.26 and 176.28 (1) of the Wisconsin Statutes. The basis of the alleged invalidity is the claim that these State statutes have and are depriving the plaintiff of due process of law in violation of the fourteenth amendment to the United States Constitution.

The first cause of action seeks damages, and the second seeks injunctive relief. At a pretrial conference held on March 25, 1969, it was agreed that the two causes of action would be separated, and the second cause of action would be decided first. Following an oral motion on behalf of the defendants for judgment on the pleadings in respect to the second cause of action, it was further agreed that the sole issue for determination of the defendant's motion is whether the Wisconsin Statutes in question are on their face constitutional. A hearing limited to this issue was held on June 6, 1969.

FACTS

For the purposes of this motion, the facts as alleged in the pleadings will be regarded as true. The plaintiff, Norma Grace Constantineau, is an adult resident of the City of Hartford, Wisconsin. The defendant, James W. Grager, is the Chief of Police of the City of Hartford, Wisconsin.

On January 23, 1969, defendant Grager, in his capacity as Chief of Police and acting pursuant to § § 176.26 and 176.28 (1) of the Wisconsin Statutes, posted a notice in the retail liquor outlets in the City of Hartford, Wisconsin. This notice informed the person or establishment notified that they were forbidden "to sell or to give away to Norma Grace Constantineau any intoxicating liquors of whatever kind for a period of one year from date, under pain of the penalties provided by Sections 176.26 and 176.28 (1) of the Wisconsin Statutes."

This notice was signed by the defendant, James W. Grager, as Chief of Police on January 23, 1969.

It is uncontested that the plaintiff received no notice or hearing whatsoever prior to this posting, and that as a result of this posting she has been unable to purchase intoxicating liquors within the City of Hartford, Wisconsin.

STATUTES INVOLVED

The statutes pursuant to which the defendant Grager acted provide as follows:

"176.26 Liquor; beer and ale; sale forbidden; to whom. (1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as thereby to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, the wife of such person, the supervisors of such town, the mayor, chief of police or aldermen of such city, the trustees of such village, the county superintendent of the poor of such county, the chairman of the county board of supervisors of such county, the district attorney of such county or any of them, may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same. A copy of said writing so signed shall be personally served upon the

person so intended to be prohibited from obtaining any such liquor or beverage.

"(2) And the wife of such person, the supervisors of any town, the aldermen of any city, the trustees of any village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney or sheriff of such county, may, by a notice made and signed as aforesaid, in like manner forbid all persons in such town, city or village, to sell or give away intoxicating liquors or drinks or fermented malt beverages to any person given to the excessive use of such liquors, drinks or beverages, specifying such person, and such notice shall have the same force and effect when such specified person is a nonresident as is herein provided when such specified person is a resident of said town, city or village."

"176.28 Sale to forbidden person; evidence; pleading. (1) When the sale or giving away of any intoxicating liquors or fermented malt beverages to any person shall have been forbidden in the manner provided by law, every person who shall sell or give to, or for, or purchase or procure for, or in behalf of, such prohibited person any such intoxicating liquors or fermented malt beverages, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding $250 and the costs of prosecution; and in default of immediate payment thereof he shall be committed to the county jail or house of correction not less than 60 days unless sooner discharged by the payment of such fine and costs."

ARE THE STATUTES ON THEIR FACE UNCONSTITUTIONAL?

The issue before this court is not whether a State may regulate the sale or gift of liquor to persons who by their excessive drinking misspend their funds so as to expose themselves or their families to want or their communities to liability for the support of themselves or their families or endanger

their own health or the peace and welfare of their communities. The power of a State to regulate the purchase, sale, or gift of intoxicating liquors within its borders is well established. Because of the well-recognized noxious qualities of such liquors and the potential extraordinary evil which may result from their misuse, this police power has been held to encompass absolute prohibition as well as severe restriction. *Ziffrin v. Reeves,* 308 U.S. 132 (1939); *Crane v. Campbell,* 245 U.S. 304 (1917). Rather the issue raised by this cause of action of the complaint is whether these particular statutes, enacted for an admittedly legitimate State objective, are nonetheless unconstitutional because in reaching that objective they violate the constitutional rights of individuals who are "posted."

It is the opinion of this court that § § 176.26 and 176.28 (1) of the Wisconsin Statutes are on their face unconstitutional in that they violate the procedural due process requirements of the fourteenth amendment to the United States Constitution. The concept of procedural due process is an elusive concept, the exact meaning of which varies with the particular factual context. As stated in *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 895 (1961) –

> " * * * consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. * * *"

In the instant case, the private interest affected by the statutes is not only the ability of the plaintiff to purchase alcoholic beverages within the City of Hartford, but also the interest of the plaintiff in not being exposed to unfounded public defamation, embarrassment, and ridicule. On the other

hand, the governmental interest involved is the function of the State in regulating the sale of alcoholic beverages so as to prevent the dangers to individuals and the public that stem from their excessive use.

It is the defendants' position that having delineated the relative interests involved, procedural due process in the given situation does not require notice and hearing prior to "posting." They contend that when one weighs the police power of the State to control intoxicating liquors with the interest of the plaintiff in this case, the balance is clearly struck in favor of the former. With this conclusion we cannot agree.

In "posting" an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such "posting" or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter.

At the very minimum, due process requires that a person about to be "posted" be given an opportunity to answer the allegation that his behavior brings him within one of the categories set forth in the statutes. The statutes, however, include no provision whatsoever for either notice or hearing prior to "posting," and for this reason it is our opinion that they are unconstitutional on their face.

In ruling that a person about to be "posted" is entitled to an opportunity to be heard, we do not mean that he is entitled to a full hearing with all of the constitutional ramifications thereof. Such a person is entitled, however, to an opportunity to confront the person claiming that his conduct warrants his being "posted" and to present his side of the story before he is in fact "posted."

The statutes involved also present serious constitutional questions with regard to the scope of persons to whom the "posting" is delegated as well as the definitiveness of the grounds for which an individual can be posted. However, having found that the statutes are unconstitutional as violative of due process, we do not find it necessary to reach these additional issues.

For the foregoing reason, it is the opinion of this Court that § § 176.26 and 176.28 (1) of the Wisconsin Statutes are on their face unconstitutional.

Dated at Milwaukee, Wisconsin, this *13th* day of *August*, 1969.

/s/ John W. Reynolds
John W. Reynolds,
U. S. District Judge

/s/ Myron L. Gordon
Myron L. Gordon,
U. S. District Judge

69-C-29

DUFFY, Senior Circuit Judge, dissenting.

I respectfully dissent. I believe my colleagues have failed to give effect to the well-established law that the states of our country possess a very high degree of police power in all matters pertaining to the regulation of intoxicating liquors.

"The power of a state to absolutely prohibit the sale of intoxicating liquor includes the power to permit the sale thereof under definitely prescribed conditions, and such business or traffic may be permitted only under such conditions as will limit to the utmost its evils. Similarly, the power to prohibit absolutely the manufacture of intoxicating liquors includes the power to prohibit conditionally, or to impose reasonable regulations or conditions upon, such manufacture." 30 Am. Jur., Intoxicating Liquors, § § 23, p. 541.

Over fifty years ago the United States Supreme Court recognized that ". . .the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge." *Crane v. Campbell,* 245 U.S. 304, 308 (1917). This statement was specifically approved in *Samuels v. McCurdy,* 267 U.S. 188, in an opinion written by Chief Justice Taft.

In *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, the Supreme Court stated: "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

We should here weigh the nature of the government's functions and powers against the affected right of the individual. We note that plaintiff's attorney, both in his brief and on oral argument, conceded that the right of his client to drink intoxicating liquors is not a right protected by the United States Constitution. In *Rice v. Sioux City Cemetery,* 349 U.S. 70, 72, the Court said: "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment, can its protection be invoked."

The great police power of the states over intoxicating liquor already existing was increased by the passage of the Twenty-first Amendment to the United States Constitution. That amendment provides in substance: "The transportation or importation into any State or Territory . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." It is thus clear that the Twenty-first Amendment to the federal Constitution bestows on the states broad regulatory power over the liquor traffic. In 48 Corpus Juris Secundum, Intoxicating Liquors, § 33, p. 167, it is stated: "The Twenty-First Amendment to the federal Constitution bestows on the states broad regulatory power over the liquor traffic."

In *Crowley v. Christensen*, 137 U.S. 86, 90-91, the Court stated: "Not only may a license be exacted from the keeper of the saloon . . . but restrictions may be imposed as to the class of persons to whom they may be sold...."

In *Cafeteria Workers v. McElroy, supra,* plaintiff Rachel Brawner was a shortorder cook in a cafeteria operated by her employer on a military base supervised by the defendant Secretary of Defense. She had worked there for six years. Her employer was satisfied with her work. The defendant withdrew her right to enter on the military base which was, of course, a condition necessary for her employment. Plaintiff challenged defendant's action saying that due process required that she be given notice of a hearing before any such action could be taken. The Supreme Court held that defendant's exparte actions met the requirement of due process despite the absence of any notice to the plaintiff or a hearing.

In the *Cafeteria Workers'* case, *supra,* the Court noted that the plaintiff was free to obtain employment as a short order cook with the same employer at another location, saying:

"All that was denied her was the opportunity to work at one isolated and specific military installation." 367 U.S. 896.

Here, it can be stated that while bartenders in Hartford were prohibited from selling intoxicating liquors to the plaintiff, such prohibition was restricted to the city of Hartford and for a period of one year.

In *Parker v. Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 at 228, the Court noted that the plaintiff was denied the right to work in the public schools in one county in Maryland. In *Chafin v. Pratt*, 358 F. 2d, 349 357, the Court noted that plaintiff "was free to work elsewhere."

There is here no claim by plaintiff that the statement prepared by the defendant pursuant to Wisconsin Statutes §176.26 and §176.28 was untrue or unwarranted. There was no effort by the plaintiff to obtain a hearing before the defendant or anyone else.

In view of the unreversed decisions of the United States Supreme Court, I conclude that the requirements of due process are met by Sections 176.26 and 176.28 (1) of the Wisconsin Statutes. If the Supreme Court's decisions are to be disregarded or modified, I think that is the prerogative of the Supreme Court and that it is not the prerogative of a United States District Court.

/s/ F. Ryan Duffy
U. S. Senior Circuit Judge, 7th Cir.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

69-C-29

NORMA GRACE CONSTANTINEAU, Plaintiff

v.

JAMES W. GRAGER, Chief of Police, Hartford, Wisconsin, and STATE OF WISCONSIN, Defendants

ORDER

Filed Nov. 25, 1969

This matter having come before the three-judge district court, hereinbefore convened, for a hearing on the second cause of action alleged in the complaint which challenges the constitutionality of § § 176.26 and 176.28 (1) of the Wisconsin Statutes, and the Court having heard counsel and being fully advised in the premises, and a majority of said court being of the opinion that § § 176.26 and 176.28 (1) of the Wisconsin Statutes are unconstitutional on their face,

IT IS NOW THEREFORE ORDERED that the defendants herein be and they are enjoined from enforcing the provisions of § § 176.26 and 176.28 (1) of the Wisconsin Statutes.

Dated at Milwaukee, Wisconsin, this *25th* day of November, 1969.

/s/ John W. Reynolds
U. S. District Judge